

Empire Moving & Storage, Inc. and Local 240, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 29-RC-5545

May 28, 1982

DECISION AND ORDER REMANDING PROCEEDING

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the Regional Director's Report on Objections issued on December 10, 1981. The Board has reviewed the record in light of the exceptions and briefs, and adopts the Regional Director's findings and recommendations only to the extent consistent herewith. In his report, the Regional Director recommended that Petitioner's objections be dismissed for failure to meet the Board's service requirements. For the following reasons, we reverse that recommendation.

The essential facts as found by the Regional Director appear undisputed. Pursuant to a Stipulation for Certification Upon Consent Election executed by Petitioner and the Employer, an election by secret ballot was conducted on November 13, 1981.¹ The vote was one for, and two against, Petitioner, with one nondeterminative challenged ballot. Thereafter, on November 16, Petitioner filed timely objections to the Employer's conduct with the Board's Regional Office. However, the objections did not include a statement of proof of service of the objections upon the Employer. By letter dated November 18, the Region acknowledged receipt of the objections and advised Petitioner of the requirement to make immediate service on the Employer.² On November 23, 3 calendar days and 1 working day after the objections were due, Petitioner served the Employer.³ Thereafter, on De-

cember 8, the Employer requested the Regional Director to dismiss Petitioner's objections on the ground that Petitioner had failed to serve it timely with a copy of the objections.

In recommending dismissal of the objections, the Regional Director found that, while Petitioner had timely filed its objections on the Regional Office, it nonetheless was 3 days late in serving the Employer, and that it made service on the Employer only after being advised by the Region of its obligation to do. He noted that Petitioner offered no reason for its delay, which it admitted was a matter of inadvertence. Noting that the fact that the Employer had suffered no prejudice by this delay was irrelevant under prevailing Board law, the Regional Director recommended dismissing the objections. As indicated, we reverse.

Our decision here is governed by two considerations. In *Alfred Nickles Bakery, Inc.*,⁴ and as reaffirmed in *Auto Chevrolet, Inc.*,⁵ the Board indicated that:

[I]n order to support a variance or deviation from the clear requirements of the Board's Rules, there must be some showing that there has been an honest attempt to substantially comply with the requirements of the Rules, or, alternatively, a valid and compelling reason why compliance was not possible. . . .

However, as was also indicated in *Alfred Nickles Bakery, supra*, the Board in determining whether certain objections are timely does not adopt "a 'slavish' adherence to form rather than substance."⁶ Applying these two principles here, we think the Regional Director erred in dismissing the objections. We note that the objections were, in fact, timely filed with the Region. There is no showing of bad faith or of any intent to delay the proceedings in Petitioner's late service of the objections on the Employer. That service, while 3 calendar days late, was only 1 business day late. And Petitioner immediately served the Employer when it was informed of its oversight in the matter.⁷ Indeed, it served the objections prior to any motion to dismiss those objections for untimely service being filed by the Employer.⁸ In all these circumstances,

mary" of the objections. As the "objections" are, in fact, one paragraph in length and in summary form, we are satisfied that, on November 23, the Employer received a copy of the only "objections" which Petitioner filed in this proceeding.

⁴ 209 NLRB 1058, 1059 (1974).

⁵ 249 NLRB 529 (1980).

⁶ 209 NLRB at 1059.

⁷ Cf. *Alfred Nickles Bakery, Inc., supra*; *High Standard, Inc.*, 252 NLRB 403, 405, fn. 7. See also *Glesby Wholesale, Inc.*, 259 NLRB 54 (1981).

⁸ Cf. *Auto Chevrolet, Inc., supra*; *Platt Brothers*, 250 NLRB 325 (1980).

¹ All dates are in 1981 unless noted otherwise.

² Sec. 102.69(a) of the Board's Rules and Regulations, Series 8, as amended, provides, in pertinent part, as follows:

Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. *Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made.* The party filing objections shall, upon request, promptly furnish to the regional director the evidence available to it to support the objections. [Emphasis supplied.]

³ To the Regional Director, the Employer had claimed that it had never received a copy of the objections, but had received only a letter from Petitioner stating that objections had been filed. In its brief to the Board, however, the Employer now claims it received at least a "sum-

we think the better course here is to accept Petitioner's objections.

Accordingly, we will remand this matter to the Regional Director for an investigation of Petitioner's objections and any further action deemed appropriate.

ORDER

It is hereby ordered that this proceeding be, and it hereby is, remanded to the Regional Director for Region 29 for investigation of Petitioner's objections and for any further action deemed appropriate.

MEMBER HUNTER, dissenting:

Contrary to my colleagues, I would affirm the Regional Director's dismissal of Petitioner's objections based on its failure to comply with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. In my view, the Regional Director properly found that Petitioner failed to show either "an honest attempt to substantially comply with the Rules [of service]" or "a valid and compelling reason why compliance was not possible" within the time required by the rules.⁹

The facts are correctly set forth by the majority. However, while my colleagues note that Petitioner immediately took steps to effectuate service on the Employer after being informed by the Regional Director of its initial failure to do so, my colleagues fail to observe that Petitioner did not offer any reason for its initial failure to comply with our service requirements. In fact, there is no good reason for that failure since Petitioner *admitted* to the Regional Director that it had "inadvertently failed to [serve the Employer] although it was aware that such service could be made contemporaneously with service to the Board." Notwithstanding this admission, my colleagues find Petitioner's objections should not be dismissed. They do so apparently because Petitioner did serve its objections on the Employer shortly after they were due; because Petitioner served those objections promptly after being notified that they had not been served on the Employer; and because the objections were, in fact, served before the Employer's motion to dismiss was filed. However, under current Board precedent, and particularly the view expressed in *Auto Chevrolet, supra*, all these facts are irrelevant to a finding that there has been substantial compliance with our Rules.

At the outset, I note that the happenstance that Petitioner served the objections shortly after they were due, and before any motion to dismiss was

filed, is a result of the Regional Office's alertness rather than of any action by Petitioner. Thus the Region, in its November 18 letter to Petitioner acknowledging receipt of the objections, informed Petitioner that service had not been made on the Employer as required by the Rules. Only then did Petitioner make service on the Employer. And the fact that Petitioner quickly served the Employer is also irrelevant. In sum, I think, the decision points out anew the pitfall in the *Auto Chevrolet* approach to determining the timeliness of objections. That approach, which calls for a case-by-case determination of whether a party who has filed late objections still has made an "honest attempt" to "substantially comply" with our Rules, has resulted in a myriad of decisions reaching different results on facts not significantly different from one another. I have already set out my views in this area at some length in *Theta Cable of California*.¹⁰ Certain of the points I made there, however, bear repeating here. In *Theta Cable*, I indicated that:

. . . I can conclude only that the Board's putative adherence in principle to *Auto Chevrolet*, coupled with its apparent willingness to abandon its application in practice, only leads to confusion on the part of our regional directors and the labor bar. For my part, I endorse as the most sensible route out of this particular morass the proposal, first advanced by the dissent in *Auto Chevrolet*, that the regional directors serve on all parties copies of objections which have been timely filed with the Region. Such an approach, already undertaken routinely with respect to unfair labor practice charges and representation petitions, would require little additional administrative effort or expense on the part of Regional Offices but would save the Regions, the Board, and the parties considerable time and expenditure which result from the consideration of cases such as the instant one. Accordingly, I favor a revision of our rules to reflect that the Regions will serve copies of timely objections on all necessary parties to the election proceeding and I commend such an approach to my colleagues.

I still favor the approach that I outlined in *Theta Cable, supra*. Short of this, however, I think adherence to present Board precedent requires finding that Petitioner's objections were untimely since they were admittedly served on the Employer after their due date and there was no excuse offered for that delay, other than mere inadvertence.

⁹ *Auto Chevrolet, Inc.*, 249 NLRB 529 (1980), quoting *Alfred Nickles Bakery, Inc.*, 209 NLRB 1058, 1059 (1974).

¹⁰ 261 NLRB 1172 (1982).